

TANJONG JARA BEACH HOTEL SDN BHD

a

v.

**NATIONAL UNION OF HOTEL, BAR & RESTAURANT
WORKERS PENINSULAR MALAYSIA**

b

FEDERAL COURT, PUTRAJAYA
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NO: 02-15-2003 (W)]
23 OCTOBER 2004

c

LABOUR LAW: *Industrial Court - Jurisdiction - Exercise of interpretative power under s. 33(1) Industrial Relations Act 1967 to determine complaint filed under s. 56 of same - Whether Industrial Court acted in excess of jurisdiction - Whether interpretation of collective agreement disclosed error of law - Industrial Relations Act 1967, ss. 29, 30(5) - Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers - National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd - Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union*

d

e

The respondent union filed a complaint with the Industrial Court ('IC') against the appellant company under s. 56(1) of the Industrial Relations Act 1967 ('the Act') for non-compliance of art. 11 of a collective agreement governing the contract of employment of some of its members employed by the appellant as workmen. The appellant ran a hotel and terminated the workmen due to closure of business for renovation and refurbishment works. The respondent claimed that the workmen were not paid their pro-rata bonus under art. 11 when the appellant terminated them. The IC decided in favour of the respondent. However, the High Court quashed the award of the Industrial Court on the basis that the IC erred in exercising an interpretative function under s. 56(1) of the Act when it could only do so under s. 33 thereof. On appeal, the Court of Appeal reversed the High Court's decision. Hence the appeal before the Federal Court. The issues were: (i) whether the IC had the jurisdiction to exercise its interpretative power under s. 33(1) of the Act in non-compliance proceedings brought under s. 56 of the same; and (ii) whether the interpretation by the IC of the collective agreement disclosed an error of law.

f

g

h

i

a Held (dismissing the appeal)

Per Steve Shim CJSS delivering the judgment of the court:

- b** [1] There may be cases in which interpretation of an award or collective agreement is a *sine quo non* to ascertain whether there has been non-compliance of the same. To refrain from exercising such determination, the IC will be perceived as abdicating the powers conferred upon it by s. 29 of the Act including those that require the court to expedite matters before it. This cannot be the intention of Parliament. The dissenting view expressed by Wan Suleiman SCJ in *Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers* was preferred to that of the majority decision expressed by Seah SCJ therein. *National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd* (foll). *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* (foll). (pp 669 b-d)
- c**
- d** [2] Parties placed in the position of the appellant would not be denied the opportunity of being heard if the IC were to exercise its interpretative functions under s. 33(1) of the Act when dealing with a complaint under s. 56(1) of the same. This is because of the extensive discretionary powers conferred upon the IC under s. 29 of the Act. In the present case, the appellant was given the opportunity of ventilating its case before the IC. No miscarriage of justice had occurred. (pp 669 e-h & 670 a-b)
- e**
- f** [3] A tedious and cumbersome cycle of events will emerge if the IC has no jurisdiction to resolve a dispute involving interpretation of an award or collective agreement on a complaint brought under s. 56 of the Act. Section 29 of the Act, in particular para. (g), provides that the IC may direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it. (pp 670 h & 671 a)
- g** [4] The IC had the threshold jurisdiction to interpret the collective agreement in order to determine whether or not there had in fact been non-compliance thereof. It was important to bear in mind that the sole object of such exercise was for the purpose of determining whether or not there had been non-compliance of the collective agreement. (p 671 b-c)

h

i

- [5] Section 30(5) of the Act stipulates that the IC shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. In applying the powers under s. 30(5), the IC has to bear in mind the underlying objectives and purposes of the Act itself, namely, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner. Therefore the *raison d'être* of the IC is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship. (pp 671 h & 672 c-d) a
b
c
- [6] The date in which the appellant chose to terminate the services of its employees was questionable. The appellant deliberately chose a date with the obvious intention of avoiding payment of bonus to its employees on a pro-rata basis under art. 11 of the collective agreement. No reasonable explanation was given by the appellant as to why it chose a date just prior to the month of December 1996 that had the effect of depriving the employees of their due benefits under art. 11. There was nothing to suggest that the appellant would have suffered or was likely to suffer irreparable harm, whether financially or otherwise, if it had chosen a date in January 1997. Not surprisingly, the Court of Appeal held that that amounted to unfair labour practice on the part of the appellant. Although the action taken by the appellant in terminating the services of the employees did not contravene the strict terms of art. 11, however, if seen as a deliberate attempt to evade or avoid its obligations under art. 11, then the appellant could not possibly take advantage of the alleged non-contravention. (pp 672 e-g & 673 a) d
e
f
- [7] The IC found sufficient evidence of abuse by the appellant of art. 11 of the collective agreement. If there was unfair labour practice, this would necessarily have the effect of victimizing the employees. Victimization is the antithesis to industrial peace and harmony. Therefore, when art. 11 was construed in the light of such abuse, unfair labour practice and victimization, it was not unreasonable for the IC to find the appellant guilty of non-compliance of art. 11. In the circumstances, the Court of Appeal was correct in finding that the IC committed no error of law in construing art. 11. (p 673 c-e) g
h

i

a [Bahasa Malaysia Translation Of Headnotes]

- b* Responden kesatuan sekerja memfailkan aduan dengan Mahkamah Perusahaan ('MP') terhadap syarikat perayu di bawah s. 56 Akta Perhubungan Perusahaan 1967 ('Akta tersebut') bagi ketidakpatuhan art. 11 perjanjian kolektif yang mengendalikan kontrak pekerjaan beberapa ahli-ahlinya yang diambil kerja oleh perayu sebagai pekerja. Perayu menjalankan sebuah hotel dan memberhentikan pekerja-pekerja tersebut kerana penutupan perniagaan untuk kerja-kerja pembaikan dan pembaharuan. Responden mendakwa bahawa pekerja-pekerja tidak dibayar bonus mengikut kadar yang wajar di bawah art. 11 apabila perayu memberhentikan mereka. MP memutuskan memihak kepada responden.
- c* Bagaimanapun, Mahkamah Tinggi membatalkan award MP atas dasar bahawa MP tersalah dalam menggunakan fungsi tafsiran di bawah s. 56(1) Akta tersebut kerana MP hanya boleh berbuat demikian di bawah s. 33 Akta tersebut. Apabila dirayui, Mahkamah Rayuan mengakaskan keputusan Mahkamah Tinggi. Maka rayuan ini di hadapan Mahkamah Persekutuan. Isu-isunya adalah: (i) sama ada MP mempunyai bidang kuasa untuk menggunakan kuasa tafsirannya di bawah s. 33(1) Akta tersebut di dalam prosiding ketidakpatuhan di bawah s. 56 Akta yang sama; dan (ii) sama ada tafsiran oleh MP terhadap perjanjian kolektif menunjukkan kesilapan undang-undang.
- d*

e **Diputuskan (menolak rayuan)**

Oleh Steve Shim HBSS menyampaikan penghakiman mahkamah:

- f* [1] Ada kes-kes di mana tafsiran sesuatu award atau perjanjian kolektif merupakan *sine quo non* bagi menentukan sama ada terdapat ketidakpatuhan. Jika MP tidak menggunakan penentuan tersebut, MP akan dianggap sebagai melepaskan hak kuasa-kuasanya di bawah s. 29 Akta termasuk kuasa-kuasanya yang memerlukan mahkamah untuk mempercepatkan perkara-perkara di hadapannya. Ini bukan niat Parliament. Pendapat bertentangan Wan Suleiman HMA di dalam kes *Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers* di sokong berbanding dengan keputusan majoriti yang disuarakan oleh Seah HMA.
- g* *National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd* (diikuti). *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* (diikuti).
- h* [2] Pihak-pihak dalam kedudukan perayu tidak akan dilepaskan kesempatan untuk didengar jika MP menggunakan fungsi tafsirannya di bawah s. 33(1) Akta tersebut apabila bertindak atas aduan di bawah s. 56 Akta yang sama. Ini disebabkan kuasa-kuasa budi bicara luas yang diberikan kepada MP di bawah s. 29 Akta tersebut. Di dalam kes semasa, perayu telah diberi kesempatan untuk mengutarakan kesnya di hadapan MP. Tiada salah laksana keadilan.
- i*

- [3] Keadaan yang panjang, remeh dan sukar akan muncul jika MP tidak mempunyai bidang kuasa untuk menyelesaikan sesuatu pertikaian yang melibatkan tafsiran sesuatu award atau perjanjian kolektif atas aduan di bawah s. 56 Akta tersebut. Seksyen 29 Akta tersebut, terutamanya para. (g) menyatakan bahawa MP boleh mengarah dan membuat semua yang sepatutnya atau yang secepatnya bagi mempercepatkan penentuan perkara di hadapannya. a
- [4] MP mempunyai bidang kuasa asal untuk mentafsir perjanjian kolektif bagi menentukan sama ada atau tidak terdapatnya ketakpatuhan. Adalah mustahak untuk mengingatkan bahawa objek satu-satunya bagi pelaksanaan tersebut bertujuan menentukan sama ada atau tidak terdapatnya ketakpatuhan perjanjian kolektif. b
- [5] Seksyen 30(5) Akta tersebut menyatakan bahawa MP akan bertindak mengikut ekuiti, suara hati baik dan merit substantial kes dengan tidak mempedulikan bentuk teknikal atau undang-undang. Dengan memakai kuasa-kuasa s. 30(5), MP mesti mengingatkan objektif dan tujuan asas Akta tersebut tersendiri, iaitu, Akta tersebut adalah sebahagian undang-undang berhasrat mengekalkan keadilan sosial di antara majikan dengan pekerja dan untuk memajukan perkembangan industri dengan membawa harmoni dan perhubungan baik di antara kedua pihak tersebut; untuk membasmikan amalan kerja yang tidak adil; untuk melindungi pekerja daripada penganiayaan majikan dan untuk menyelesaikan pertikaian industri secara aman. Dengan itu *raison d'être* MP adalah untuk berusaha menyelesaikan tuntutan persaingan di antara majikan dengan pekerja dengan adil dan saksama dan bertujuan mengukuhkan harmoni di antara kapital dan pekerja dengan menggalakkan perhubungan baik. c
- [6] Tarikh perayu memilih untuk memberhentikan perkhidmatan pekerja-pekerjanya dipersoalkan. Perau dengan sengaja memilih tarikh tersebut dengan niat jelas bagi mengelakkan pembayaran bonus kepada pekerja-pekerjanya mengikut kadar yang wajar di bawah art. 11 perjanjian kolektif. Tiada penjelasan munasabah diberikan kenapa perayu memilih tarikh sebelum bulan Disember 1996 yang melucutkan faedah mereka di bawah art. 11. Tiada apa untuk mencadangkan bahawa perayu akan mengalami atau berkemungkinan mengalami kerosakan yang tidak boleh dibaiki, sama ada dari segi kewangan atau sebaliknya jika ia pilih tarikh di dalam bulan Januari 1997. Dengan itu, tidaklah hairan apabila Mahkamah Rayuan mendapati amalan kerja yang tidak adil di sebelah pihak perayu. Tindakan yang diambil perayu memberhentikan perkhidmatan pekerja-pekerja d
- e
- f
- g
- h
- i

- a* memang tidak langgar terma tegas art. 11. Tetapi, jika dilihat sebagai suatu percubaan sengaja untuk mengelakkan kewajipannya di bawah art. 11, maka perayu tidak boleh mengambil kesempatan atas dakwaan bahawa tidak ada pelanggaran art. 11.
- b* [7] MP mendapati keterangan mencukupi penyalahgunaan art. 11 perjanjian kolektif oleh perayu. Jika terdapat amalan kerja yang tidak adil, ini akan mempunyai kesan menganiaya pekerja-pekerja. Penganiayaan adalah percanggahan kepada keamanan industri dan harmoni. Dengan itu, apabila art. 11 dilihat dari sudut penyalahgunaan, amalan kerja yang tidak adil dan penganiayaan, ianya bukanlah tidak munasabah bagi MP untuk mendapati perayu salah kerana ketakpatuhan art. 11. Dalam keadaan demikian, Mahkamah Rayuan betul mendapati bahawa MP tidak melakukan kesilapan undang-undang dalam tafsiran art. 11.
- c*

Case(s) referred to:

- d* *Dragon & Phoenix Berhad & Kesatuan Pekerja-pekerja Perusahaan Membuat Tekstil & Pakaian Pulau Pinang & Anor* [1990] 2 ILR 57 (**refd**)
Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC (**refd**)
Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers [1988] 1 CLJ 133; [1988] 1 CLJ (Rep) 116 SC (**not foll**)
- e* *National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd* [1989] 1 CLJ 141; [1989] 1 CLJ (Rep) 121 SC (**foll**)
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA (**foll**)

Legislation referred to:

- f* Industrial Relations Act 1967, ss. 29, 30(5), 33(1), (2), 56(1)

Other source(s) referred to:

- Abu Hashim Hj Abu Bakar, *The Philosophy And Concept Of Industrial Relations In Malaysia*, Insaf, vol xxi no 3
- g* *For the appellant - Peh Lee Kheng (Thavalingam Thavarajah & Yong Hon Cheong); M/s Zaid Ibrahim & Co*
For the respondent - B Lobo; M/s Maha & Peri
Reported by Usha Thiagarajah

h

i

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

This is an appeal against the decision of the Court of Appeal given on 23 May 2003. Leave to prosecute this appeal was granted by this court on 23 September 2003 on the following question:

Whether the Industrial Court in exercising its power and jurisdiction under section 56(1) of the Industrial Relations Act, 1967, can exercise its interpretative functions under section 33(1) of the Act in respect of the scope and ambit of a term of a collective agreement for the purposes of deciding whether there has been a non-compliance of the term complained of.

The Background Facts

The factual matrix relevant to this appeal can be briefly stated. The appellant ran a hotel which employed some members of the respondent union as workmen. The contract of employment of these workmen was governed by a collective agreement which was given cognizance of by the Industrial Court as No. 255/93. By letters dated 1 September 1996, the appellant served notice on the respondent stating that the appellant would effect “a closure of business” from 1 December 1996 due to renovation and refurbishment works. On the same date, the appellant also gave notice of termination of service to its employees expiring on 30 November 1996. The appellant paid the employees the retrenchment benefits but did not grant them bonus. The respondent claimed that the employees should be paid pro-rata bonus under art. 11 of the collective agreement. Accordingly, it filed with the Industrial Court a complaint under s. 56(1) of the Industrial Relations Act 1967 (“the Act”) for non-compliance of the said art. 11 by the appellant. The appellant disputed the complaint. The matter was heard by the Industrial Court. It decided in favour of the respondent and ordered the appellant to pay the employees their pro-rata bonus for 1996. Dissatisfied, the appellant applied to the High Court for an order of *certiorari* to quash the award. In granting the order, the High Court held that the Industrial Court had erred in exercising an interpretative function under s. 56(1) of the Act when it could only do so under s. 33 thereof. On appeal, the Court of Appeal reversed the High Court’s decision. Against that reversal, the appellant sought leave to appeal to the Federal Court. Leave, as we have said, was granted.

a Court Of Appeal's Perspective On ss. 56 And 33 Of The Act

Essentially two main issues were raised in the Court of Appeal. First, whether the Industrial Court had jurisdiction to exercise its interpretative power under s. 33(1) of the Act in non-compliance proceedings brought under s. 56 thereof. Second, whether the interpretation by the Industrial Court of the collective agreement in the instant case disclosed an error of law. Let us begin with the first issue.

b In determining this issue, the Court of Appeal appears to have relied more on the dissenting view expressed by Wan Suleiman, SCJ in *Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar & Restaurant Workers* [1988] 1 CLJ 133; [1988] 1 CLJ (Rep) 116 as well as its own decision in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748. The majority decision of the Supreme Court in *Holiday Inn* is expressed by Sean SCJ who, in construing s. 56 of the Act, states as follows:

d Now, section 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognizance of by the Court under section 17 after a complaint has been lodged as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its power contained in sub section (2) thereof. It is therefore a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant.

e Applying this to the facts of this case, it follows that when the complaint of the Union under section 56(1) of the Act was received, the first function of the Industrial Court was to inquire into and finally determine the question whether the Union has brought its case within the terms that the Hotel had not complied with the collective agreement which had been taken cognizance of by the Industrial Court.

f In my judgment, under section 56 of the Act, the Industrial Court is charged with the enforcement of an award or collective agreement which has been taken cognizance by the Court after a complaint has been received alleging non-compliance with one or more terms of the award or collective agreement. On the authority of the *Federal Hotel* case, the Industrial Court is not charged with the duty of interpreting or adjudicating the term or terms of an award or collective agreement which are disputed by the contracting parties concerned. Section 33 provides for this and the legislature has laid down certain procedures to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under section 33 can only be exercised on a definite

g

h

i

application made for that purpose (see the *Federal Hotel* case). In other words, any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of section 56. a

It seems clear that Seah SCJ takes the view that once a complaint under s. 56(1) is lodged, the Industrial Court has (to use his words) “to inquire and finally determine” whether or not there has been non-compliance as alleged by the complainant. So quite obviously, there is a burden on the part of the Industrial Court to resolve the issue. A question arises as to the extent of jurisdiction involved. Seah, SCJ in expressing the majority view, states that if the resolution of the issue involves interpretation, then the Industrial Court will be acting in excess of its jurisdiction if it proceeds to deal with it under s. 56 because it is a matter which falls under s. 33(1) of the Act. According to him, “any question of interpretation or adjudication of a term of an award or collective agreement is not within the scope of s. 56.” b

In his dissent in *Holiday Inn*, Wan Suleiman SCJ makes a pertinent observation when he says: d

... It would suffice to say that on 10 January 1981 the Union wrote to the Registrar of the Industrial Court to lodge a complaint under s. 56(1) of the Act to the effect that the Hotel had neglected to comply with the collective agreement in that it had not included service charge in the ordinary and hourly rate of pay under certain clauses which were enumerated, of the collective agreement. The Industrial Court then proceed to hear the complaint and on February 18, 1981, it made an award. e

As one would expect, the award involved, as it unavoidably should, interpretation of the various articles of the collective agreement. f

Quite clearly, his Lordship takes the position that in determining a complaint as to whether or not there has been non-compliance of a term of the award or collective agreement, the element of interpretation is unavoidable. Not surprisingly, he finds no flaw in the observation of the Industrial Court which states: g

When the Industrial Court hears a complaint lodged to it under section 56 of the Industrial Relations Act, it is the function of the Industrial Court to interpret the collective agreement the subject of the complaint, and to interpret the law relevant to the matter. In the present case, the award of the Industrial Court shows that when it made the finding and the order, it did so following its interpretation of the provisions of the collective agreement and of the relevant law. It did nothing more than interpretation and it is within its jurisdiction to interpret. It has not done anything which is outside its jurisdiction. h

i

- a* Wan Suleiman SCJ finds that such observation does not run counter to the sentiments expressed by the Federal Court in *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150. However, Seah SCJ has taken a different view. According to him, the above observation of the Industrial Court was actually rejected in *Federal Hotel Sdn Bhd*, citing in support the following sentiments of Abdooldader J who said:
- b*

The learned judge held that although section 56 did not apply, section 33(2) did as there appeared to be some uncertainty in regard to the implementation of the first award and that the Industrial Court therefore had jurisdiction although it purported to proceed under the wrong statutory provision. We must dissent. We cannot see how section 33(2) can apply as it requires, in order to come into operation, an application by a party to an award to vary any of its terms whereupon the Industrial Court has power to accede thereto only in accordance with the specific provisions thereof.

- c*
- d* Having read *Federal Hotel Sdn. Bhd. (supra)* including the excerpt above, with the utmost care and consideration, we must, with the greatest respect, disagree with Seah SCJ. We are inclined to adopt the same position taken by Wan Suleiman SCJ. It seems clear to us that the Federal Court in *Federal Hotel Sdn Bhd* has merely examined the ambit and scope of s. 56 and s. 33(2) of the Act in the context of the peculiar circumstances of that case.
- e*

The Significance Of *National Union Of Petroleum Case*

In our view, a subsequent case decided by the Supreme Court is significant. This is the case of *National Union of Petroleum & Chemical Industry Workers v. Amalgamated Properties & Industries Bhd.* [1989] 1 CLJ 141; [1989] 1 CLJ (Rep) 121. There, Wan Hamzah SCJ who wrote the main judgment had occasion to deal with the scope of s. 56(1) and (2) of the Act. The facts are relevant. In 1984 and 1985 some of the employees of the respondent company were retrenched. They were not paid bonus for part of the year in which they were retrenched. The respondent company contended that the employees were not entitled to bonus on the ground that the collective agreement did not provide for payment of such bonus but only bonus for completed years of employment. Article 30 of the collective agreement dealt with bonus. The appellant union lodged a complaint to the Industrial Court under s. 56 of the Industrial Relations Act 1967. The Industrial Court found in favour of the appellant union and ordered the respondent company to pay the bonus. Dissatisfied, the respondent company moved the High Court for an order of *certiorari* to quash the order of the

i

Industrial Court. One of the grounds relied on was that the Industrial Court had no jurisdiction to exercise its powers under s. 33(1) of the Industrial Relations Act 1967 on a complaint under s. 56(1). After hearing arguments, the High Court granted the order of *certiorari*. Against that order, the appellant union appealed to the Supreme Court. Wan Hamzah SCJ in dealing with s. 56(1) & (2) of the Act in the context of art. 30(a) and (c) of the collective agreement said as follows:

It appears to us that art. 30(a) is ambiguous, but in our view, it was open to the Industrial Court to interpret it by analogy to art. 30(c) as it did, and by adopting such interpretation, it cannot be said that the Industrial Court acted beyond its jurisdiction. It had the jurisdiction to interpret the collective agreement, either correctly or wrongly. As regards the contention that the Industrial Court had interpreted wrongly and had thereby varied the terms of the collective agreement, we find that the Industrial Court had the power to make such variation under section 56(2) if it considered such variation desirable. Apparently in the opinion of the Industrial Court, it was desirable to maintain consistency with art. 30(c) in considering whether the retrenched employees should be paid the claimed bonus.

It seems clear from the above that the Supreme Court did not find any flaw in the Industrial Court's resolution of the complaint of non-compliance of the collective agreement lodged under s. 56(1) by way of interpretation of certain articles therein. In allowing the appeal, the decision has the effect of rejecting the proposition by the High Court that the Industrial Court had no jurisdiction to exercise its powers of interpretation under s. 33(1) on a complaint under s. 56(1) of the Act. Quite clearly, the Supreme Court in *National Union of Petroleum* has taken a completely different stand from the Supreme Court in *Holiday Inn* on the issue. It may be of interest to note that both cases were in fact presided by Lee Hun Hoe, CJ (Borneo). Whilst *Holiday Inn* was a majority decision, the judges in *National Union of Petroleum* were unanimous. This could mean that Lee Hun Hoe, CJ (Borneo) had changed his mind about the issue although it must be pointed out that *Holiday Inn* appeared not to have been cited in the later case. In any event, his Lordship, in a subsequent case of *Dragon & Phoenix Berhad & Kesatuan Pekerja-Pekerja Perusahaan Membuat Tekstil & Pakaian Pulau Pinang & Anor* [1990] 2 ILR 57 (which he also presided) appeared to have moved back to his original stand when he agreed with the observation of Harun M. Hashim SCJ that ss. 33 and 56 of the Act were mutually exclusive in terms of jurisdiction. Here again, we should point out that neither *Holiday Inn* nor *National Union of Petroleum* appeared to have been cited. Therein, Harun M. Hashim SCJ said as follows:

- a* In a complaint of non-compliance with any term of a collective agreement or award under section 56 of the Industrial Relations Act, the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely enforcement function. It should not embark on an expedition to examine the provisions of
- b* the Employment Act in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the interpretative function of the court under section 33 of the Industrial Relations Act which is an entirely different exercise from that under section 56. ... It is also important to separate the two functions in order to determine which
- c* particular jurisdiction of the Industrial Court is exercising in any particular case. It may well be that in a dispute such as the present case there should have been two separate applications to the Court, the first under s. 33 to invite the Court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under section 56.
- d* Here, his Lordship seems to take the position that the Industrial Court, in determining the complaint of non-compliance of a collective agreement or an award lodged under s. 56(1), is restricted to looking at the four walls of the said collective agreement or award. With respect, we think that the determination of any such dispute must necessarily involve the examination of the collective agreement or award against the factual circumstances of
- e* the case. To consider the collective agreement or award in isolation would not, in our view, resolve anything. The collective agreement or award must be looked at in the context of the material facts of the particular case.
- f* In any event, in line with existing authorities, where there is a dispute, the Industrial Court is empowered under s. 56(1) to decide whether or not there has been non-compliance of the collective agreement or award. As we have indicated earlier, the Supreme Court by a majority in *Holiday Inn* takes the stand that the Industrial Court has no jurisdiction to resolve the dispute by way of interpretation. However, the Supreme Court in *National Union of Petroleum* thinks otherwise. Quite clearly, there is a conflict of
- g* authorities on the issue. For the reasons which we have stated, we find the dissenting view expressed by Wan Suleiman SCJ in *Holiday Inn* to be eminently sound. He said this:
- h* Once a complaint is lodged under section 56 that a term or terms of the collective agreement is not being complied with or if what was on the face of it such a complaint is in effect an application under section 33(1) for interpretation ... then the court is seized with the narrow jurisdiction referred to both in the *National Union of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn. Bhd* [1986] 2 MLJ 17, a decision of this Court,
- i*

as well as in the earlier decision of *Inchape Malaysia Holdings Bhd v. R.B. Gray & Anor* [1985] 2 MLJ 297. Having being seized with jurisdiction to examine, the Industrial Court then has a wider jurisdiction to examine the complaint on its merit. a

In the instant case, counsel for the appellant contends that the Court of Appeal fell into error in relying on its own authority in *Syarikat Kenderaan Melayu Kelantan Bhd (supra)* in holding that ss. 33(1) and 56 cannot be treated as being housed in watertight compartments with no permissible overlap under any circumstances. In our view, the stand taken by the Court of Appeal finds support not only in the dissenting judgment of Wan Suleiman SCJ in *Holiday Inn* but also in the unanimous decision of the Supreme Court in *National Union of Petroleum*. We agree entirely with the observation expressed by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd* that there may be cases in which interpretation of an award or collective agreement is a *sine quo non* to ascertain whether there has indeed been non-compliance of the same. To refrain from exercising such determination, the Industrial Court would, in our view, be perceived as abdicating the powers conferred upon it by s. 29 of the Act including those which require the court to expedite matters before it. That could not have been the intention of Parliament. b
c
d

Now, counsel for the appellant has raised the concern that parties placed in the position of the appellant would be denied the opportunity of being heard if the Industrial Court were to be allowed to exercise its interpretative functions under s. 33(1) when dealing with a complaint under s. 56(1). We do not think there is any merit in this proposition given the extensive discretionary powers conferred upon the Industrial Court under s. 29 which stipulates: e
f

29. Power of the Court

The Court may, in any proceedings before it:

- (a) order that any party be joined, substituted or struck off; g
- (b) summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings;
- (c) take evidence on oath or affirmation and compel the production before it of books, papers, documents and things; h
- (d) hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply to the Court within such time as may be prescribed by the President or in the absence of any party to the proceedings who has been served with a notice or summons to appear; i

- a* (e) conduct its proceedings or any part thereof in private;
- (f) after consultation with the Minister, call in the aid of one or more experts;
and
- (g) generally direct and do all such things as are necessary or expedient for
- b* the expeditious determination of the matter before it.

Certainly in the instant case, the appellant was given the opportunity of ventilating its case before the Industrial Court. Indeed both parties were fully heard by the Industrial Court on the complaint. No miscarriage of justice has occurred.

c **A Tedious And Cumbersome Scenario**

- In our view, s. 56 applies primarily to cases where the complaint of non-compliance is clear and unambiguous and there is no dispute. The Industrial Court can proceed to exercise its powers of enforcement. If however, there is dispute on the complaint, either because the award or the collective agreement is not clear or for other reasons, a question arises as to whether the court can proceed to resolve the issue. On the authority of *Holiday Inn* (by majority), the court cannot do so if the resolution of the dispute involves interpretation of the award or collective agreement. It takes the view that the court has no such jurisdiction because interpretation falls within the ambit of s. 33(1) and not s. 56(1) of the Act. The court will have to dismiss the complaint.
- d*
- e*

- The necessary implication arising from this is that the complainant will have to invoke s. 33(1) by way of a separate application. If the court, after having heard the parties in dispute, construes the award or collective agreement in favour of the complainant, that becomes a decision in the nature of an award within the definition of s. 2 of the Act. The offending party may comply with it or it may not. If it does not comply, then the complainant can invoke s. 56(1) and have it enforced under s. 56(2). A problem may then arise because the offending party can again dispute the complaint lodged under s. 56(1) and the court will have to resolve the matter. If, for any reason, the matter touches or is likely to involve interpretation of the said award under s. 33(1), on the authority of the majority decision in *Holiday Inn*, the court will have no jurisdiction under s. 56(1). A tedious and cumbersome cycle of events emerges with no resolution of the complaint in sight. It becomes an exercise in futility. Clearly, that cannot have been the intention of the legislature given the expansive powers provided to the court under s. 29, in particular para. (g)
- f*
- g*
- h*

i

thereof which states that in any proceeding before it, the court may direct and do all such things as are necessary or expedient for the expeditious determination of the matter before it. *a*

Conclusion On The First Issue

For the reasons stated, we agree with the view expressed by the Court of Appeal in the instant case that the Industrial Court had the threshold jurisdiction to interpret the collective agreement in order to determine whether or not there had in fact been non-compliance thereof. It is important to bear in mind that the sole object of such exercise is for the purpose of determining whether or not there has been non-compliance of the collective agreement. Given the authorities cited, we are of the firm view that the answer to the leave question postulated for our consideration has to be in the affirmative. *b*
c

Whether Error Of Law Disclosed In Construing art. 11 Of The Collective Agreement *d*

We now turn to the second issue which is whether the construction of art. 11 of the collective agreement by the Industrial Court disclosed an error of law. Article 11 reads as follows:

The Hotel shall pay at the end of each calendar year a bonus as follows:

- (a) One (1) month's salary as bonus to employees who have served the Hotel for not less than one year and are in the employment of the Hotel on 31 December each year. *e*
- (b) An employee who has served the Hotel for six (6) calendar months or more but less than twelve (12) calendar months and who is in the employment of the Hotel on 31 December each year shall be entitled to a bonus calculated on a pro-rata basis for the number of months served. For the purpose of this Article fifteen (15) days and more of a calendar month shall be deemed to be one (1) calendar month. *f*

At the outset, it is we think, necessary to reflect on the extraordinary powers conferred upon the Industrial Court in resolving industrial disputes. They are all encompassing. This is s. 30(5) of the Industrial Relations Act 1967 (the Act) which stipulates: *g*

The Court shall act according to equity good conscience and the substantial merits of the case without regard to technicalities and legal form. *h*

i

- a* It has been said, quite rightly, that industrial jurisprudence and industrial justice have a prior obligation and adherence to social justice as distinguished from legal justice and therefore have far wider powers than ordinary civil courts in the prescription, recognition and creation of rights, duties and obligations so as to achieve industrial harmony thereby enhancing the economic well-being of the nation: (see Insaf Vol. XXI no. 3 – *The philosophy and concept, of industrial relations in Malaysia* – by Abu Hashim bin Hj. Abu Bakar, Chairman, Industrial Court.) In applying the powers under s. 30(5) above, the Industrial Court has to bear in mind the underlying objectives and purposes of the Act itself ie, that it is a piece of legislation designed to ensure social justice to both employers and employees and to advance the progress of industry by bringing about harmony and cordial relationship between the parties; to eradicate unfair labour practices; to protect workmen against victimization by employers and to ensure termination of industrial disputes in a peaceful manner.
- c*
- d* Clearly therefore, the *raison d’etre* of the Industrial Court is to endeavour to resolve the competing claims of employers and employees by finding a solution which is just and fair to both parties with the object of establishing harmony between capital and labour and fostering good relationship.

- e* In the instant case, the appellant (hotel) terminated the services of its employees because it wanted to do renovation and refurbishment works which would require temporary stoppage of the operations of the hotel. That in itself was quite proper. What is questionable was the date in which the appellant had chosen to terminate their services. Here, the Industrial Court and the Court of Appeal took the view that the appellant had deliberately chosen a date with the obvious intention of avoiding payment of bonus to its employees on a pro-rata basis under art. 11 of the collective agreement. They found no reasonable explanation given by the appellant as to why it should have chosen a date just prior to the month of December 1996 which would have the effect of depriving the employees of their due benefits under the said art. 11. There is nothing to show or suggest that the appellant would have suffered or likely to suffer irreparable harm, whether financially or otherwise, if it had, say, chosen a date in January 1997. Not surprisingly, the Court of Appeal held that this amounted to an unfair labour practice on the part of the appellant. Given the peculiar factual circumstances we are not prepared to state that the conclusion arrived at by the Court of Appeal is an unreasonable one.
- f*
- g*
- h*

i

It may well be argued that the action taken by the appellant in terminating the services of the employees did not contravene the strict terms of art. 11 of the collective agreement but if that action of the appellant was seen as a deliberate attempt to evade or avoid its obligations under the said art. 11, then it cannot possibly take advantage of the alleged non-contravention. It would be against the tenets of equity and good conscience to do so. And that was precisely how the Industrial Court felt. On the evidence adduced before the Industrial Court, we are not prepared to disagree with that conclusion.

In our view, this is not really a question of whether the said art. 11 is fair or unfair. It is a question of whether there has been an abuse of that article. Here, the Industrial Court found sufficient evidence of abuse by the appellant of art. 11 in the manner alluded to earlier. This was sustained by the Court of Appeal. "It smacks of unfair labour practice" said the Court of Appeal. If there was unfair labour practice, this would necessarily have the effect of victimizing the employees. And victimization is the antithesis to industrial peace and harmony. Thus, when art. 11 is construed in the light of such abuse, unfair labour practice and victimization, it is not unreasonable for the Industrial Court, applying well established principles of industrial law, good conscience and equity, eschewing technicalities and legal form, to find the appellant guilty of non-compliance of the said art. 11. In the circumstances, we agree with the Court of Appeal that the Industrial Court committed no error of law on the second issue.

Conclusion

For the reasons stated, we have no hesitation in dismissing this appeal with costs. Deposit to the respondent to account of taxed costs.